

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

V5 TECHNOLOGIES, LLC d/b/a COBALT
DATA CENTERS,

Case No. 2:17-cv-02349-KJD-VCF

**ORDER GRANTING DEFENDANT'S
MOTION TO PERMIT TESTIMONY BY
CONTEMPORANEOUS
TRANSMISSION**

Plaintiff.

V.

SWITCH, LTD.,

Defendant.

Before the Court is Defendant's Motion to Permit Troy Logan's Testimony in Open Court by Contemporaneous Transmission pursuant to FRCP 43(a) (ECF #424). Plaintiff responded in opposition (ECF #427) and Defendant replied (ECF #430).

I. Factual and Procedural Background

Defendant Switch, LTD. (“Switch”) filed a motion to permit the testimony of Troy Logan (“Logan”) to be heard via videoconference in open court. (ECF #424). Logan was diagnosed with leukemia in 2008 and has undergone cancer treatments for about 13 years. Id. at 2. Logan contracted COVID-19 once and fears contracting it again. Id. Switch identified Logan as a potential witness in its Fourth Supplement to Initial Disclosures on September 27, 2019. Id. In its opposition, Plaintiff V5 Technologies, LLC d/b/a Cobalt Data Centers (“Cobalt”) argues that Logan should not be permitted to testify at all because he is not required to testify as he lives outside the subpoena power of the Court and because Switch did not disclose Logan as a potential witness until 5:00 p.m. on the final day of the discovery period. (ECF #427, at 6). Cobalt argues that its counsel spoke with Logan and learned that he did not want to testify at all. Id. at 8. Cobalt implies that Switch manipulated Logan into testifying by failing to inform him that he was not required to testify. Id. In its reply, Switch included a declaration from Logan as

1 an exhibit, stating that Logan is aware that he does not have to testify but wishes to regardless.
 2 (ECF #424-1).

3 II. Legal Standard

4 Generally, at trial all “witnesses’ testimony must be taken in open court.” Fed. R. Civ. P.
 5 43(a). However, “[f]or good cause in compelling circumstances and with appropriate safeguards,
 6 the court may permit testimony in open court by contemporaneous transmission from another
 7 location.” Id. “Determining whether good cause and compelling circumstances exist is a matter
 8 left to the court’s discretion.” Gould Electronics, Inc. v. Livingston Cnty. Road Commission, 470
 9 F.Supp.3d 735, 740 (E.D. Mich. 2020). “The most persuasive showings of good cause and
 10 compelling circumstances are likely to arise when a witness is unable to attend trial for
 11 unexpected reasons, such as accident or illness, but remains able to testify from a different
 12 place.”” Julian Liu v. State Farm Automobile Ins. Co., 507 F.Supp.3d 1262, 1264 (W.D. Wash.
 13 2020) (quoting Fed. R. Civ. P 43(a) advisory committee’s notes).

14 III. Analysis

15 Cobalt argues that it would not be fair to permit Logan’s testimony because Switch did
 16 not disclose Logan as a potential witness until 5:00 p.m. on the last day of the discovery period.
 17 Cobalt did not have a chance to depose Logan during the discovery period and reopening
 18 discovery now would delay the trial. As such, Cobalt argues that it would be prejudiced if the
 19 Court were to permit Logan’s testimony. While the Court would normally prefer that witnesses
 20 be disclosed early and deposed during the discovery period, it does not find reason to exclude
 21 Logan’s testimony. Switch may not have disclosed him until the last day of the discovery period,
 22 but the disclosure was made just two weeks after discussing Logan’s role at Cobalt in other
 23 depositions. Cobalt has had since September 27, 2019 to challenge Logan’s testimony or move to
 24 reopen discovery. “Since then, [Cobalt] ha[s] sat on [its] right to bring any motion to reopen
 25 discovery on account of [Switch’s] last-minute disclosure.” Roe v. Nevada, 621 F.Supp.2d 1039,
 26 1061 (D. Nev. 2007). Courts are generally “unimpressed” by a party’s “assertions of prejudice
 27 when any harm could have been minimized through the movant’s prompt action in either
 28 obtaining a stipulation with opposing counsel or moving the Court for relief.” Silvagni v. Wal-

1 Mart Stores, Inc., 320 F.R.D. 237, 243 n.7 (D. Nev. 2017). Because Cobalt waited to challenge
2 the last-minute disclosure, any prejudice is caused by Cobalt’s own conduct. Roe, 621 F.Supp.2d
3 at 1061. Therefore, the Court rejects Cobalt’s argument to preclude Logan’s testimony because it
4 was not timely disclosed.

5 Cobalt also argues that Logan’s testimony should not be permitted because Logan does
6 not want to testify and lives outside the Court’s subpoena power. If Logan does not want to
7 travel to testify, then he simply should not travel. However, Logan’s declaration attached to
8 Switch’s reply shows that Logan is aware that he is not required to testify. Logan wants to
9 testify, he simply fears traveling as he is at elevated risk injury from COVID-19. As such, the
10 Court rejects this argument from Cobalt. As the Court resumes trials, it takes precautions to limit
11 the risk of spreading COVID-19. Individuals at high risk of serious injury from COVID-19 take
12 even greater precautions. Logan, who has been diagnosed with leukemia and received cancer
13 treatments since 2008, is one such individual. The Court finds that his elevated risk of injury
14 associated with COVID-19 constitutes good cause and a compelling circumstance to warrant
15 testimony from outside the courtroom. The Court will ensure that appropriate safeguards are in
16 place to receive reliable transmission of Logan’s testimony.

IV. Conclusion

18 Accordingly, IT IS HEREBY ORDERED that Defendant's Motion to Permit Troy
19 Logan's Testimony in Open Court by Contemporaneous Transmission pursuant to FRCP 43(a)
20 (ECF #424) is **GRANTED**.

21 Dated this 13th day of October, 2021.


Kent J. Dawson
United States District Judge